

**TNT Skypak, Inc. and Local 851, International Brotherhood of Teamsters, AFL-CIO. Cases 29-CA-16046 and 29-CA-16154**

September 30, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On April 22, 1993, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order and adopts the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(1) by soliciting grievances and interrogating employees about their union activity. The judge dismissed two other 8(a)(1) allegations. No exceptions were filed to these findings, and they are adopted pro forma. The judge also found that the Respondent violated Section 8(a)(3) by discharging employee Derrick Reed for supporting the Union during an organizing campaign. We reverse and find, contrary to the judge, that the Respondent rebutted the General Counsel's prima facie case.

*A. Facts*

The Respondent, TNT Skypak, Inc., operates an international courier service in the State of New York. The Union began an organizing campaign in June 1991,<sup>2</sup> which culminated in the Union's election victory September 6, 1991. Reed, one of the Respondent's drivers, was known as a vocal union supporter.

The judge largely credited the testimony of Joseph Macor, a supervisor during the time at issue who is no

longer employed by the Respondent, on the events leading up to Reed's discharge. The judge observed that Mark Lagares, the Respondent's New York city operations manager, for the most part corroborated Macor's version of the events. The following factual account is based on Lagares' and Macor's testimony.

On July 23, Macor reprimanded Reed for unreported, undelivered packages. Macor noted this oral warning in Reed's personnel file. On Friday, September 27, another driver assigned to Reed's vehicle discovered undelivered newspapers and airbills for undelivered packages in Reed's van. When Reed returned to work on Monday, September 30, Macor and Lagares informed him that he would receive a written warning for failing to report the undelivered packages. As Reed walked away, he muttered something to the effect of "stupid mother fucker." Lagares followed Reed into the warehouse and informed Reed that he would also receive a written reprimand for insubordination. Reed then loaded his van and drove away.

Shortly thereafter, Macor and Lagares heard Reed swearing over the van's two-way radio. Lagares heard him say, "they're all stupid mother fuckers. I don't give a fuck if they hear me." Macor testified that, in addition to the profanity used on the radio, Reed said "things to the effect of, you know, I'm going to get them but I'm going to do it right because if not I'll wind up at Riker's Island."<sup>3</sup> Lagares heard him say, "I'm going to sue. I'm going to do it the right way because if I don't I'll end up at Riker's." Lagares directed a dispatcher to order Reed to return. Upon Reed's return, Lagares suspended him, pending disciplinary action. Later that day, Lagares told Reed that he was terminated. Lagares stated that he discharged Reed for "gross insubordination and threatening and/or abusive behavior," including Reed's statements over the two-way radio.

*B. The Judge's Decision*

The judge rejected the Respondent's assertion that it discharged Reed because of his repeated misconduct. The judge found that the Respondent "vacillated" in its reason for the dismissal and failed to prove it had the policy against profanity over the radio which it had alleged as a reason for Reed's discharge. The judge compared Reed's use of profanity to that of another employee and found that the Respondent had treated Reed more harshly. The judge concluded that the Respondent had not sustained its burden of showing that Reed was discharged for "gross insubordination" or for "threatening behavior."

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge credited the General Counsel's witness, Derrick Reed, only in part and did not credit his account of the events on the day of his termination when it differed from the versions given by the Respondent's witnesses. The Respondent relies on this in part in arguing that Reed should not be credited at all. A trier of fact, however, is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says. *Brinkman Southeast*, 261 NLRB 204 (1982); *Giovanni's*, 259 NLRB 233 (1981); *Maxwell's Plum*, 256 NLRB 211 (1981); *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

<sup>2</sup> All dates are in 1991.

<sup>3</sup> Riker's Island is a New York prison.

### C. Analysis

Under the *Wright Line* test,<sup>4</sup> to prove a violation of the Act turning on employer motivation, the General Counsel must establish a prima facie case that animus against union activity or other protected conduct was at least a motivating factor in the action at issue. The employer may escape liability for its action either by rebutting the prima facie case, i.e., disproving one or more of the critical elements of that case, or by establishing as an affirmative defense that it would have taken the same action even in the absence of the employee's protected conduct. We agree with the judge that the General Counsel established a prima facie case. We disagree, however, with his finding that the Respondent failed to establish that it would have discharged Reed even if he were not an outspoken union supporter.

The record as a whole shows that the Respondent dismissed Reed for a combination of valid reasons. First, management reprimanded him on September 30 for leaving undelivered newspapers in his van and for failing to report undelivered packages. The importance of this incident is highlighted by the fact that this warning was Reed's second for the same conduct.<sup>5</sup> When Reed swore at Macor and Lagares, Lagares informed him that he would receive another reprimand, this time for insubordination. The day's events culminated in Reed's diatribes and threats voiced over the radio.<sup>6</sup> Regardless of whether the Respondent had a policy against profanity, management had specifically warned the drivers, including Reed, about such statements. Reed's statements, broadcast on the radio for all to hear, were abusive and threatening, and the Respondent was not obliged to tolerate them.

The judge concluded that the Respondent vacillated in its rationale for dismissing Reed and inferred that the Respondent's asserted reasons for Reed's discharge were pretextual. The judge based his conclusion solely on a letter written by the Respondent's vice president of human resources, Anthony Ventiera. On December 5, Ventiera realized that he had not received the October 29 notice of determination on Reed's unemployment benefits hearing. He requested a copy from the New York State Department of Labor and received it on December 13. Because he had only 30 days to respond, he dictated, "off the top of [his] head," a letter requesting a hearing. He did so, he testified, hoping that the Department of Labor would consider his overdue request. The letter stated that Reed's dismissal was

for a "violation of policy in using profanity on the two-way radio that was in his van." The judge characterized this statement as "vacillation" by the Respondent because the letter did not mention Reed's insubordination and threatening behavior.

In relying on the letter written by Ventiera, the judge omitted Ventiera's explanation of its contents. Ventiera's involvement in the discharge was minimal. After Lagares suspended Reed, he consulted Ventiera by telephone. Ventiera asked him to document the day's events and fax a memo to him. Lagares and Ventiera then discussed the matter further, and Ventiera recommended termination. He suggested, however, that Lagares call Rick Renner, senior vice president, before taking action. Renner authorized Lagares to terminate Reed. Ventiera's involvement in the discharge, thus, was indirect, and he did not contact Lagares, or any other company official, to refresh his memory before writing the December 13 letter. Thus, the Respondent did not offer shifting reasons: Ventiera did not establish a new or different explanation for the discharge but, we find, broadly stated one of several reasons for Reed's termination.

In finding that a policy against profanity over the radio did not exist, the judge relied on the testimony of Michael Yanis, shop steward and driver. Yanis stated that, at the time of Reed's discharge, the Respondent did not have such a rule.

We find that, while the Respondent did not have an explicit policy against the use of profanity, the record supports the Respondent's position that it had a policy requiring its employees to act "professionally" on the radio and to limit their use of the radio to "business" matters. The judge acknowledged Ventiera's testimony about the morning staff meetings, where Lagares asked the drivers to act "professional on the airways." Macor, a witness credited by the judge, stated that management regularly told employees at prework communication meetings that the radio was "for business use only."<sup>7</sup>

No reasonable person could consider Reed's profanity and threats on the radio to be "professional" or to satisfy a "business" need. We conclude that Reed's conduct contravened the Respondent's policies.

The judge found disparate treatment because he considered the Respondent's treatment of another employee inconsistent with that of Reed. He pointed out that Rooney, the dispatcher, used profanity over the radio during the summer of 1991 and merely received a written warning.

<sup>4</sup> 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>5</sup> The judge made no finding that the first reprimand, issued July 23, was unlawful, and no exceptions were taken.

<sup>6</sup> The judge omitted from his analysis Lagares' warning in the warehouse and Reed's threats over the radio.

<sup>7</sup> These morning meetings took place during the summer of 1991, before Reed's discharge on September 30. Reed testified that he regularly attended these staff meetings.

We find, however, that Rooney's profanity was not nearly as objectionable as Reed's. Yanis, the shop steward, characterized Rooney's profanity as a "slip-up." Yanis did not believe Rooney's "intention was to really curse on the radio." Examples of such infractions given by Yanis included "oh fuck" and "oh shit" and he described them as "a word here or two." These "slip-ups" differ considerably from Reed's profane diatribe directed toward management.

We find that Rooney's reprimand, rather than evidencing disparate treatment, supports the Respondent's contentions that it had a policy against using profanity over the radio and that it had enforced this policy prior to Reed's discharge. We do not find the Respondent's treatment of the two employees disparate because we find that Reed's statements were far more serious than Rooney's. We find that Reed's profanity was not a "slip-up"; his comments amounted to "profanity plus," not an accidental word or two.

Additionally, we note that the Respondent has consistently argued that it did not discharge Reed solely for one incident but for his entire course of conduct. Thus we find, based on the foregoing considerations, that the Respondent has shown that it would have discharged Reed for its clearly lawful reasons even in the absence of his union activities. Accordingly, we dismiss the complaint regarding that allegation.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, TNT Skypak, Inc., Garden City and Queens, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(c) and 2(a)-(c).
2. Renumber the subsequent paragraphs accordingly.
3. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT solicit employee grievances and impliedly promise our employees that we will resolve their grievances if they do not select the Union as their collective-bargaining representative.

WE WILL NOT interrogate our employees regarding their activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

#### TNT SKYPAK, INC.

*Marcia E. Adams, Esq.*, for the General Counsel.  
*Clifford P. Chalet, Esq. (Kaufman, Naness, Schneider & Rosensweig)*, of Melville, New York, for the Respondent.  
*Robert Archer, Esq. (Meyer, Suozzi, English & Klein)*, of Mineola, New York, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Brooklyn, New York, on January 20 and 21, 1993. On charges filed on October 15 and November 29, 1991,<sup>1</sup> a consolidated complaint was issued on January 31, 1992, alleging that TNT Skypak, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by the Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

##### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a New York corporation with offices in Garden City and Queens, New York, is engaged in the operation of an international courier service. Respondent admits that it annually purchases and receives at its Queens facility goods valued in excess of \$50,000, directly from entities located outside of the State of New York. At the hearing, Respondent took the position that it may be subject to the Railway Labor Act, as amended, 45 U.S.C. § 151. On January 26, 1993, the National Mediation Board issued a decision finding that Respondent is not within the jurisdiction of the Railway Labor Act. 20 NMB 153 (1993). Accordingly, Respondent has moved to amend its answer to admit jurisdiction by the National Labor Relations Board. I grant Respondent's motion and find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Local 851, International Brotherhood of Teamsters, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> All dates refer to 1991 unless otherwise specified.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

## 1. Alleged violations of Section 8(a)(1)

In June 1991 the Union commenced an organizational campaign among the drivers employed by Respondent at its Queens location. Derrick Reed had been a driver for Respondent since October 1989. In the early part of the summer of 1991 he signed a union authorization card and subsequently had meetings concerning union activities with other drivers in the warehouse and in the parking lot of the Queens facility. On July 2 a meeting was held between management and the drivers. A number of issues were discussed, including medical benefits, problems with the vehicles, and salary increases. Reed credibly testified that Mark Lagares, the operations manager, told the drivers "if we have any problems we could . . . come to them." Among the drivers Reed was the "key" speaker.

On July 17 the Union filed a petition for certification. On July 23 another meeting was held between management and the drivers. Michael Yanis, a driver, credibly testified that representatives of management told the employees that "they think that a union is not good for us" and if the drivers had any problems they could come to either Lagares or Joseph Macor, the assistant operations manager. Yanis also credibly testified that representatives of management were "asking drivers about problems," were "taking down lists of problems," and said that they would "try to achieve the best that they can to solve these problems." Yanis credibly testified that Reed questioned management about overtime, salary, working conditions, and vans being properly maintained.

William Lindo, another driver, signed a union authorization card sometime prior to July 17. He credibly testified that after he signed the card, Lagares and Macor approached him in the warehouse and asked him "what have you heard lately about the Union," when the union meetings were going to take place and who was going to attend. Lindo replied that he did not know.

Yanis credibly testified that beginning in July management held frequent meetings with the drivers. Representatives of management would continuously tell the drivers that they felt that the Union was "not good for them." Yanis testified that Reed always spoke up at the meetings, that he was "very outspoken about the way he felt" and that he would generally express his views on wages, overtime and discuss why "we're being treated unfairly." Similarly, Lindo credibly testified that at these meetings "the main person who spoke up was Derrick Reed," and that the other drivers did not say much.

On September 4 an evening meeting was held at a local bar between management and the drivers. John Ovens, a member of management, did most of the speaking on behalf of Respondent. Yanis credibly testified that Ovens said that "they wanted to be given a chance and that they don't think the Union's good for them." Ovens also said that he wanted to hear the drivers' problems and "things that they can work out with us." Reed told Respondent's representatives that "you had your chance, why don't you give the Union a chance?" Reed further credibly testified that at this meeting William Brannan, president of Respondent, also told the employees to "come to us with your problems." On September

6 a secret-ballot election was held, at which time a majority of the drivers voted in favor of the Union.

## 2. Suspension and discharge of Reed

Reed did not work on Friday, September 27. Macor, who appeared to me to be a credible witness, testified that another driver, Gregg Edwards, was assigned to Reed's vehicle on that day. After inspecting the truck, Edwards told Macor that he found some newspapers and other items in the cargo area of the van which had not been delivered. When Reed returned to work on Monday, September 30, Macor and Lagares spoke to him about this. Reed denied that he left the material in the van. Either Lagares or Macor then told Reed that he would receive a written warning. Macor credibly testified that at this point Reed muttered something to the effect of "stupid mother f." Reed then walked into the warehouse to get his freight and his van. As he was leaving the facility he asked Lagares and Macor "if we were racist." They both answered that they were not.

Reed then started on his route. Lagares credibly testified that a short time afterward he heard Reed say over the two-way radio, "Everybody should watch out. They tried to get me." Lagares also testified that Reed said over the radio "they're all stupid m— f—. I don't give a f— if they hear me." Macor corroborated this testimony and testified that he then instructed the dispatcher to have Reed report back to the building.

Reed returned to the facility at approximately 9:30 a.m. Reed testified that Lagares then told him "I'm suspended pending a hearing." Reed further testified that later that afternoon he returned to the warehouse and told Lagares that when the hearing takes place he would like the Union to represent him. Reed testified that at this point Lagares told him that he was terminated. Lagares testified that when Reed returned to the warehouse in the morning he told him that he was suspended pending disciplinary action up to and including discharge. Lagares further testified that Reed came back to the facility in the early evening and asked him whether a decision had been made. Lagares replied that a decision had been made to terminate Reed's employment effective immediately. Lagares testified that Reed never asked for a hearing and was terminated for "gross insubordination and threatening and/or abusive behavior" and for the "comments that he made over the radio." In a letter dated December 13, written by Anthony Ventiera, vice president, of human resources, it was stated that Reed was terminated for "his violation of policy in using profanity on the two-way radio that was in his van."

B. *Discussion and Conclusions*

## 1. Solicitation of employee grievances

The complaint alleges<sup>2</sup> that at various times during July and August Respondent solicited employee grievances, and by so doing, impliedly promised its employees that it would resolve their grievances if they did not select the Union as their collective-bargaining representative.

At the meeting between management and the employees held on July 2 Lagares told the employees "if we have any

<sup>2</sup> General Counsel's motion to withdraw par. 8 of the complaint was granted at the hearing.

problems we could . . . come to them.” At the meeting between management and the employees held on July 23 management representatives asked the drivers about problems they were having and made lists of the problems. Management told the employees that they would try the “best that they can to solve these problems.” As stated in *Enterprise Products Co.*, 265 NLRB 544, 549 (1982):

Although making inquiries about employees’ dissatisfaction is not unlawful, standing alone, when it is done in the context of a union organizing campaign of which the Employer has knowledge and is accompanied by assurances that methods of rectification of the problems are under consideration or active study, it becomes unlawful interference by solicitation of grievances and conveying an implied promise to better working conditions in order to remove any reason for union representation.

These solicitations of complaints and grievances were done during the organizing campaign, both before and after the petition for certification was filed. In that context, I find that Respondent impliedly promised its employees that it would resolve their grievances if they did not select the Union as their collective-bargaining representative, in violation of Section 8(a)(1) of the Act.

#### 2. Interrogations

The complaint alleges that at several times during August members of management interrogated employees regarding their activities on behalf of the Union. Lindo credibly testified that sometime after he signed his union authorization card Lagares and Macor approached him in the warehouse and asked him when and where union meetings were going to take place and who was going to attend the meetings. No showing has been made that Lindo was an open, active union supporter. Lindo had signed the union authorization card in his automobile and, to his knowledge, Respondent was not aware that he had signed a card.

In *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the Board required that all the circumstances involved in an interrogation be examined to determine whether the interrogation tended to restrain, coerce, or interfere with rights guaranteed by the Act. Among the factors examined are the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Raytheon Co.*, 279 NLRB 245, 246 (1986). The interrogation was done by the operations manager and the assistant operations manager. At the time of the interrogation Lindo was not known by management to be a union supporter. After reviewing all the circumstances, I believe that the interrogation was unlawful, in violation of Section 8(a)(1) of the Act.

#### 3. Direction to refrain from speaking on behalf of the Union

The complaint alleges that in September Lagares directed employees to refrain from speaking out on behalf of the Union at employee meetings. Reed testified that in August Lagares asked “why in every meeting do I have to speak.”

Reed replied, “don’t I have a right to speak, it’s a meeting.” Reed conceded that Lagares never told him not to speak at the meetings. Reed also credibly testified that a week or two after the election Lagares approached him in the warehouse and told him, “I should have never spoken in any of the meetings, I made a big mistake.” The complaint alleges that Lagares directed its employees to refrain from speaking out on behalf of the Union. Reed conceded that Lagares never in fact told him not to speak up at the meetings. As discussed below while I believe Lagares’ statements are a factor in considering the reasons for Reed’s discharge, I do not believe that they constitute an independent violation of Section 8(a)(1) of the Act. Accordingly, the allegation is dismissed.

#### 4. Request for union representation

The complaint alleges that on September 30 Reed requested that a union representative accompany him to an investigatory interview. I have credited Lagares’ testimony that on the morning of September 30, when Reed returned to the warehouse, Lagares told him that he was suspended pending disciplinary action. I also credit Ventiera’s testimony that the Company has no procedure by which an employee is given a hearing before being terminated. I further credit Lagares’ testimony that when Reed returned to the warehouse in the afternoon of September 30, he asked Lagares whether a decision had been made. Lagares told him that a decision had been made to terminate his employment, effective immediately. At that point Reed told Lagares that he was going to call the Union. I do not find that Reed requested that a representative of the Union accompany him at an “investigatory interview.” Accordingly, the allegation is dismissed.

#### 5. Discharge of Reed

I have largely credited Macor’s version of the events which took place on September 30. Macor appeared to me to be a credible witness and his testimony is for the most part corroborated by Lagares. His version of the events appears to me to be more plausible than Reed’s account. I find that on the morning of September 30 Lagares and Macor spoke to Reed about several items which were not delivered and newspapers being left in the van. Either Lagares or Macor then told Reed that he would receive a written warning. At this point Reed uttered some profanity and he walked into the warehouse. Before he left the facility he asked Lagares and Macor whether they were “racist.” Shortly afterwards Lagares and Macor heard Reed say over the two-way radio “Everybody should watch out. They tried to get me” and “They’re all stupid mother f—.” Reed was then instructed to report back to the warehouse. When he returned, Lagares told him that he was suspended. Later that afternoon Reed returned to the warehouse and Lagares told him that he was terminated effective immediately.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer’s decision. Once this is established the burden shifts to the employer to demonstrate that the “same action would have taken place even in the absence of the protected conduct.” Reed’s discharge took place just 3 weeks after the election.

It is clear from the record that Respondent was not in favor of the Union. The record is also clear that Reed was "out-spoken" in his support of the Union. I have credited Lindo's testimony that Reed was the "main" person who spoke up at the meetings between management and the employees. Yanis corroborated this testimony. Indeed, during August Lagares asked Reed why he has to speak at every meeting and in September 1 or 2 weeks after the election Lagares told Reed that he made a "mistake" and should not have spoken up at the meetings. I imply from this statement that Respondent was very unhappy with Reed for the role he played at the meetings. In view of the above, I find that General Counsel has made a prima facie showing that Reed's union activities were a motivating factor in his discharge.

Lagares testified that Reed was discharged for "gross insubordination and threatening and/or abusive behavior" and the "comments that he made over the radio." In a letter dated December 13 to the New York State Department of Labor, Respondent stated that Reed was terminated for his "violation of policy in using profanity on the two-way radio that was in his van." There was no mention in the December 13 letter of "insubordination" or of "threatening" behavior. The Board has long expressed the view that "when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted." *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985); *F.W.L. Lundy Bros. Restaurant*, 248 NLRB 415, 428 (1980). Such an inference is warranted in this proceeding.

I believe that Respondent has not sustained its burden of showing that Reed was discharged for "gross insubordination" or for "threatening" behavior. Respondent also contends, however, that Reed was discharged for "violation of policy in using profanity on the two-way radio." I credit Yanis' testimony that prior to October 4 there had been no policy regarding the use of profanity over the radio. Indeed Ventiera conceded on cross-examination that Lagares merely had spoken to the employees with regard to being "professional on the airways." In addition, in uncontroverted testimony, both Yanis and Reed credibly testified that the dispatcher, Rooney, used profanity over the radio. Yanis also credibly testified that prior to Reed's discharge no driver had been terminated for the use of profanity. While Rooney received a warning, he was not terminated. I find, therefore, that Respondent has not satisfied its burden of demonstrating that the "same action would have taken place even in the absence of the protected conduct." Accordingly, I find that by its discharge of Reed on September 30, Respondent violated Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By soliciting employee grievances and impliedly promising its employees that it would resolve their grievances if they did not select the Union, and by interrogating its employees regarding their union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Derrick Reed because of his union activities, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate the Act in any other manner alleged in the complaint.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain action designed to effectuate the policies of the Act.

Respondent having discharged Derrick Reed in violation of the Act, I find it necessary to order Respondent to offer him full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings that he may have suffered from the time of his discharge to the date of Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>3</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, TNT Skypak, Inc., Garden City and Queens, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee grievances and impliedly promising its employees that it would resolve their grievances if they did not select the Union as their collective-bargaining representative.

(b) Interrogating its employees regarding their activities on behalf of the Union.

(c) Discharging employees for activities protected by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Derrick Reed immediate and full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings, with interest, in the manner set forth in the remedy section above.

<sup>3</sup>Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>4</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Remove from its files any reference to the unlawful discharge of Reed and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Queens, New York, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice,

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<sup>5</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are dismissed.